

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 06 September 2005**

**BALCA Case No.: 2004-INA-00349**  
**ETA Case No.: P2002-PA-03382861**

*In the Matter of:*

**ELIZABETHTOWN CHILD CARE CENTER,**  
*Employer,*

*on behalf of*

**MARIKO SATO,**  
*Alien.*

Appearance: Robert A. Remes, Esquire  
Washington, D.C.  
*For the Employer and the Alien*

Certifying Officer: Stephen W. Stefanko  
Philadelphia, Pennsylvania

Before: **Chapman, Burke, and Vittone**  
Administrative Law Judges

**John M. Vittone**  
Chief Administrative Law Judge

**ORDER OF REMAND**

This matter arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien employment certification. Permanent alien employment certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations.<sup>1</sup> We base our decision on the record upon which the CO denied

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<sup>1</sup> This application was filed prior to the effective date of the "PERM" regulations. See 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal

certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

### **STATEMENT OF THE CASE**

On April 20, 2001,<sup>2</sup> the Employer filed an application for alien employment certification on behalf of the Alien, Mariko Sato, to fill the position of "Preschool Teacher" in the State of Pennsylvania. (AF 21-22, 25). The job to be performed was described on the application as follows: "Instructs children in activities designed to promote social, physical, and intellectual growth needed for primary school. Plans individual and group activities to stimulate growth and development." Additional minimum requirements listed for the job were: "B.A./B.S." degree in "Any subject" and one year of "Nursery school teaching" experience. (AF 21, 25).

On March 14, 2002, the Pennsylvania Alien Labor Certification Office advised the Employer of defects in its Form ETA 750 application. It advised the Employer to amend its wage offer to the prevailing wage of \$20,098 per year, instead of its listed wage of \$17,680 per year. In addition, the State office notified the Employer that although it listed a requirement for one year of teaching experience, it had failed to submit documentation showing that the Alien possessed such experience. (AF 34-35).

On April 26 2002, the Employer amended the wage offer, but instead of increasing the wage to \$20,098 as advised, reduced it to \$13,000, arguing that \$12,979 was the correct prevailing wage for its "Level 1 position." (AF 21, 25, 33, 36). The Employer also deleted its one year experience requirement. The Employer then advertised the position in *The Lancaster Intelligencer Journal* on June 24, 25, and 26, 2002, and also on a bulletin board in the Elizabethtown Child Care Center. (AF 29, 31-32). Despite its advertisements, the Employer reported receiving no responses to the advertised job opening. (AF 29).

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Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

<sup>2</sup> The application is dated April 12, 2001, but it was not filed until April 20, 2001. (AF 1).

On November 13, 2003, the CO issued a Notice of Findings (“NOF”) proposing to deny certification on the following grounds: “Unduly Restrictive Job Requirements” and “Rejection of U.S. Workers.” (AF 17-19). After being granted an extension, the Employer filed a rebuttal dated January 23, 2004. (AF 6-16). The CO found that the rebuttal failed to cure the deficiencies identified in the Notice of Findings, and issued a Final Determination denying alien employment certification on July 8, 2004. (AF 3-5). The Board docketed the case on September 16, 2004.

## **DISCUSSION**

It is evident, upon review of the record in this case, that the CO mischaracterized the issue to be determined and consequently misapplied the “unduly restrictive requirements” analysis under 20 C.F.R. § 656.21(b)(2) to the facts of this case. Where a CO issues an NOF and/or Final Determination that is confusing in nature or bases his denial on inaccurate grounds, it is presumed that the Employer was not provided an adequate opportunity to respond to the request and rebut the challenge to its application, and the appropriate action is to remand the case to the CO for further consideration. *See generally The Standard Oil Company*, 1988-INA-77 (Sept. 14, 1988) (*en banc*); *Nancy Johnstone*, 1987-INA-541 (May 31, 1989) (*en banc*).

In the instant case, the CO denied certification on the grounds that the Employer’s requirement of a Bachelor’s Degree in “any subject” for the position of Pre-School Teacher was an “unduly restrictive requirement” under section 656.21(b)(2).<sup>3</sup> However, the Employer’s requirement, as first presented to the CO, is not “unduly restrictive” in the traditional sense.

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<sup>3</sup> The CO also denied certification based on the Employer’s failure to rebut the CO’s finding that the Employer did not reject U.S. workers solely for lawful, job-related reasons pursuant to 20 C.F.R. § 656.21(b)(c). In that respect, the CO stated that “since your degree in any subject was found Unduly Restrictive, your recruitment did not list the true minimum requirements for the job.” (AF 5). We conclude, however, that this finding is also confusing. First, it is rooted in the CO’s finding that the Employer offered the position with “unduly restrictive requirements,” which we find to be improper in the context of this case. Second, the CO’s determination conflates two separate regulatory provisions (i.e., “unduly restrictive requirements” and “actual minimum requirements”)—without citation—into one basis for denying certification under yet a third regulatory provision (section 656.21(b)(c)) governing recruitment of U.S. workers. Given that there is no evidence in the record demonstrating that the Employer rejected any U.S. workers or that U.S. workers even applied for the position, the CO’s finding in that respect was improper.

Rather, by opening the position up to those individuals with a Bachelor's Degree in "any subject," the Employer in effect *broadened* the pool of potential U.S. applicants.<sup>4</sup>

The confusion here lies in the fact that it appears, as the CO found, that the Employer tailored the job requirements to match the qualifications of the Alien. Such a finding typically accompanies a determination that the employer did not state the "actual minimum requirements" of the job offered under section 656.21(b)(5). The Board has held, however, that where, as here, the CO challenged the requirement as not being sufficiently stringent, section 656.21(b)(5) is not the controlling regulatory authority. *ERF Inc. d/b/a Bayside Motor Inn*, 1989-INA-105 (Feb. 14, 1990). In other words, "there is nothing in the regulations that requires an employer to add to job requirements that allegedly are too easy to meet." *Id.* Therefore, an analysis under section 656.21(b)(5) is also inappropriate here.

In essence, the CO here found that the Alien was not qualified for the position as described in the ETA 750 form because she did not possess a particular degree. Specifically, the CO determined that the position of Pre-School Teacher requires a Bachelor's Degree in Education or in a field related to Education and/or Childhood Development, which the Alien clearly does not possess. However, there is nothing in the record establishing precisely the requisite educational qualifications to be employed as a Pre-School Teacher in Pennsylvania. Indeed, the Dictionary of Occupational Titles defines Pre-School Teacher as follows:

**092.227-018 TEACHER, PRESCHOOL (education)**

Instructs children in activities designed to promote social, physical, and intellectual growth needed for primary school in preschool, day care center, or other child development facility. Plans individual and group activities to stimulate growth in language, social, and motor skills, such as learning to listen to instructions, playing with others, and using play equipment. May be required to have certification from state. May be designated Teacher, Child

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<sup>4</sup> The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of section 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 1987-INA-569 (Jan. 13, 1989) (*en banc*).

Development Center (education); Teacher, Day Care Center (education); Teacher, Early Childhood Development (education); Teacher, Nursery School (education).

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Plainly, the definition of “Pre-School Teacher” describes the duties to be performed, but lacks any description of the educational requirements for the position. Until the education parameters of “Pre-School Teacher” are established, there is no basis upon which the CO could conclude that the Alien was or was not qualified for the position with a Bachelor’s Degree in “any subject.”

This means—in the context of this case—that if the position of Pre-School Teacher in the State of Pennsylvania requires a Bachelor’s Degree in Education or some type of teaching certification, the Employer’s application should have been denied for failure to satisfy 20 C.F.R. § 656.20(c)(7), which provides that “the employer’s job opportunity’s terms, conditions and occupational environment are not contrary to Federal, State or local law.” If, on the other hand, the State of Pennsylvania does not require a bachelor’s degree in Education or a teaching certificate, the Employer’s requirement that the applicant possess a Bachelor’s Degree in “any subject” does not run afoul of the regulations.

Based on the foregoing, we find that the CO’s decision to deny labor certification on the grounds that the Employer offered the position of Pre-School Teacher with an unduly restrictive requirement is confusing and thereby **VACATED**. The case is **REMANDED** to the CO in order to permit the Employer to submit documentation regarding whether the State of Pennsylvania requires Pre-School Teachers to possess a bachelor’s degree in Education or related field and/or a teaching certificate, and whether the Alien possesses all requisite qualification for the position .

**SO ORDERED.**

For the Board:

**A**

**JOHN M. VITTON**  
Chief Administrative Law Judge

